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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BILLY FRANKLIN WILLIAMS,

Petitioner,

—v.—

EAGLE-PICHER INDUSTRIES, INC.,

Respondent.

OPPOSITION OF EAGLE-PICHER INDUSTRIES, INC. TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

1. Whether the Tenth Circuit's holding in this case—ordering a new trial because petitioner's lawyer engaged in prejudicial misconduct during the liability phase of trial thus tainting the entire jury verdict with passion and prejudice—was correct?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Docket No. 92-481

BILLY FRANKLIN WILLIAMS,

Petitioner,

—v.—

EAGLE-PICHER INDUSTRIES, INC.,

Respondent.

OPPOSITION OF EAGLE-PICHER INDUSTRIES, INC. TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Eagle-Picher Industries, Inc.[1] hereby opposes Petitioner's request for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 962 F.2d 1492 (10th Cir. 1992), and is reprinted in the Petition's Appendix at 2a-22a. The opinion of the United States District Court for the Northern District of Oklahoma is unpublished, and is reprinted in the Petition's Appendix ("Pet. App.") at 23a-30a.

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1 Eagle-Picher Industries, Inc. has no parent company and one non-wholly owned subsidiary company: Diehl & Eagle-Picher GmbH.

JURISDICTION

The decision of the Tenth Circuit vacating the district court judgment was entered on May 5, 1992. Rehearing *en banc* was denied June 22, 1992. The petition for a writ of certiorari was filed on September 23, 1992. This Court lacks jurisdiction to hear the alleged constitutional issue presented by petitioner under Article III, section 2, of the United States Constitution because it is not ripe for adjudication. Jurisdiction is otherwise invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

A. Statement of Facts

This case is one of several hundred asbestos-related personal injury actions brought in the United States District Court for the Northern District of Oklahoma as a result of the National Tire Workers Litigation Project. (Pet. App. at 24a). Petitioner Billy Franklin Williams ("Williams") was employed as a tire worker at The B.F. Goodrich Plant ("Goodrich") in Miami, Oklahoma from 1949 through 1977. (*Id.* at 25a). Williams retired from Goodrich in 1977 because he suffered from severe emphysema due to a fifty pack-year tobacco habit. (*Id.*). In July 1986, Williams was examined through a union-sponsored screening program called The Asbestos Disease Screening Program. (Resp. of Williams to Master Interrogatory No. 12). Williams commenced this action in 1988, alleging that bystander exposure to asbestos dust while working at Goodrich caused him to develop an asbestos-related lung disease known as asbestosis. Respondent Eagle-Picher Industries, Inc. ("Eagle-Picher") was one of many companies that manufactured asbestos-containing products, and is now operating as a debtor-in-possession under title 11, chapter 11, United States Code.[2]

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2 In addition to Eagle-Picher, Williams originally named 35 manufacturers of asbestos-containing products as defendants.

B. District Court Proceedings

The case was tried to a jury from January 16, 1990 through January 29, 1990.[3] By the start of trial, Williams was in the final stages of terminal colon cancer, a disease which he conceded had no connection to his alleged asbestos exposure. (*See generally* Tr. of 1/25/90 at 3-27). On the first day of trial, Williams was dramatically ushered into the courtroom in a wheelchair after the jury had been seated in the jury box; after approximately thirty minutes, Williams' counsel voluntarily wheeled his client out of the courtroom. (Pet. App. at 16a, 25a-26a). The district court later described this incident as follows:

> Mr. Williams was in a wheelchair. Mr. Williams was very bent over. Mr. Williams was having difficulty raising his head up enough to look up to the Court. It was a labored effort for him to do so. . . . His physical condition on January the 16th was so bad that during the selection of the jury the gentleman moaned audibly in a rather loud voice on numerous occasions to the point that it was distracting to the Court, to all participants . . . I seriously doubt that he was of a mental state of mind to be able to follow even what was being said or what was going on in the trial.

(Tr. of 1/25/90 at 7-8). Because it feared that the jury would mistakenly believe that Williams' "unspecified" (Pet. App. at 15a) condition was caused by the alleged asbestos exposure, Eagle-Picher immediately moved for a mistrial. (*Id.* at 16a, 26a). The district court denied the motion. (*Id.*)

During his opening statement on the following day—which, by court order, was supposed to be strictly limited to issues of liability—Williams' lawyer told the jury that Williams could not be in attendance that day because his alleged asbestos-related illness—rather than his severe emphysema or terminal colon cancer—had required his sudden hospitalization:

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3 Certain phases of the trial were jointly tried with two other tire worker cases. (Pet. App. at 8a). It was not until January 25, 1990, that the case-specific phase of Williams' trial began.

> Mr. Williams, who you all saw yesterday in the wheel chair, he cannot be here today. The evidence will be that he had to be hospitalized with pneumonia, which is one of the many complications of asbestosis.

(*Id.* at 16a). Eagle-Picher again moved for a mistrial on the ground that Williams' counsel had misrepresented the cause of plaintiff's hospitalization. (*Id.* at 16a, 26a). The district court denied Eagle-Picher's motion. (*Id.*).

On January 25, 1990, the first day of the case-specific phase of Williams' trial, Williams was again briefly paraded into the courtroom by his lawyer. Counsel for Eagle-Picher objected, and the district court admonished Williams' counsel for his prejudicial tactics at a sidebar conference:

> Mr. Norman, . . . I could not believe it, I absolutely couldn't believe it when that gentleman entered this courtroom on the day we were picking that jury. Why couldn't I believe it? I thought—I couldn't believe it from a standpoint of just the humanity of it. That man was sick. That guy sitting in this courtroom moaning and groaning[,] carrying on like that, he needed to be in the hospital . . . I was astounded by it, and I'm still astounded by it that you, representing the plaintiff would permit a man that ill to come into this courtroom.

(Tr. of 1/25/90 at 22-23; *see generally id.* at 8-23). Although the district court did not order Williams' removal from the courtroom, he was voluntarily wheeled out a short time later.

Contrary to his assertion in opening argument on January 16, Williams' counsel never introduced any evidence substantiating his claim that plaintiff's hospitalization was caused by an asbestos-related condition. (Pet. App. at 16a, 26a). Indeed, Williams' counsel later admitted to the district court that he had no such evidence to introduce. (Tr. of 1/25/90 at 14). As hospital records confirmed, the cause of Williams' hospitalization was, in fact, his colon cancer; the court, however, refused to admit these records into evidence. (Pet. App. at 28a,

n.5; Tr. of 1/26/90 at 399-401). Moreover, despite its repeated warnings to Williams' counsel to clarify his misrepresentation (*id.* at 401-402), the court gave no limiting instruction to the jury when the attorney failed to do so. (Pet. App. at 16a).

On January 29, 1990, the jury found for Williams and awarded him compensatory damages in the amount of $1.2 million. (Pet. App. at 23a, 24a). After judgment was entered, Eagle-Picher moved for a new trial. Among other things, Eagle-Picher argued that the misconduct of Williams' lawyer—parading his client before the jury and then misleading the jury to believe that asbestos exposure caused Williams' cancer-induced condition—resulted in a verdict tainted with jury bias and prejudice. (*Id.* at 15a). The district court expressly found:

> Plaintiff's appearance in court in an acutely ill condition, coupled with his counsel's misrepresentation in opening statement, and the absence of medical evidence supporting the reason for Plaintiff's current hospitalization, sowed the seeds for an award so excessive as to shock the judicial conscience and raise the inference of passion and prejudice.

(*Id.* at 26a). Nevertheless, on May 14, 1990, the district court denied Eagle-Picher's post-trial motion, and instead, granted a remittitur in the amount of $600,000, which Williams' counsel subsequently accepted. (*Id.* at 9a, 26a).[4]

C. The Court Of Appeals Decision

On May 5, 1992, the Tenth Circuit reversed the district court and remanded the case for a new trial. (*Id.* at 15a-19a). As it had maintained in the district court, Eagle-Picher argued on appeal that, due to trial counsel's misconduct, the jury verdict

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4 At a hearing before the district court on June 7, 1990, Williams' attorney stated on the record that his client had passed away approximately two months after trial. In a minute order, entered on the docket sheet on June 7, 1990, the district court "advised" counsel for Williams that he need not amend the complaint "re: Mr. Williams death." No formal substitution of parties has ever been effectuated.

was the result of passion and prejudice; however, contrary to the district court's decision, Eagle-Picher asserted that such verdict could not be cured by remittitur, but rather, required a new trial. (*Id.* at 15a). In opposition, Williams asserted that the reduced $600,000 judgment was not the result of jury passion and prejudice because it "was not the judgment of the jury, but of the judge who heard the evidence and as such sat as a '7th juror.' " (10th Cir. Br. of Williams at 23).

Consistent with its prior holdings, the Tenth Circuit recognized that there is an important distinction between the remedies available when, on the one hand, an excessive jury *award* is the result of passion and prejudice and, on the other hand, a jury *verdict* is the result of passion and prejudice; while the former may be cured by remittitur, the latter requires a new trial. (Pet. App. at 17a). The Tenth Circuit thus had to "determine whether the 'inference of passion and prejudice' found in the *Williams* verdict could be cured by remittitur or warranted a new trial." (*Id.*) Reviewing the findings made by the district court—*e.g.*, Williams' "disruptive" and "astounding" courtroom demeanor coupled with his counsel's subsequent "misrepresentation" to the jury as to the cause of Williams' illness—the Tenth Circuit held that there was "but one conclusion" in this case (*id.* at 17a): not only was the excessive *award* the product of jury passion and prejudice, but the *entire verdict* was the product of jury passion and prejudice. (*Id.* at 18a). Accordingly, the Tenth Circuit found that "a new trial is required." (*Id.* at 17a).

On May 14, 1992, the Tenth Circuit denied Williams' petition for rehearing and suggestion for rehearing *en banc*.

REASONS FOR DENYING THE PETITION

A writ of certiorari is inappropriate for three reasons. First, even if the Tenth Circuit's decision could somehow be read as barring petitioner from his own civil trial, it has long been settled that a civil plaintiff does *not* have an absolute right under

the Constitution to attend his trial. Rather, there are many circumstances which may justify barring plaintiff's attendance. Though neither the district court nor the Tenth Circuit ordered that petitioner should be precluded from attending his trial, the circumstances here would have, in any event, justified such a ruling under prevailing law because, *inter alia*, petitioner: (i) was simply paraded by his lawyer in front of the jury in order to evoke sympathy; (ii) was disruptive; and (iii) manifestly could not assist trial counsel. Accordingly, the Tenth Circuit's decision raises no constitutional questions.

Second, it is the law of this Court and of every circuit that a jury verdict tainted with passion and prejudice *cannot* be cured by remittitur, but rather, requires a new trial. Here, the district court found, and the Tenth Circuit concurred, that due to trial counsel's misconduct during the liability phase of trial, the jury was tainted by passion and prejudice. Because the Tenth Circuit determined that the *entire verdict*, and not just the damage *award*, was so tainted, it ordered a new trial. Therefore, the Tenth Circuit's decision does not create a new rule of law, nor does a conflict among the circuits exist.

Third, this case raises no justiciable constitutional question as required by Article III of the Constitution. The district court never ruled that plaintiff could not attend his trial and, in fact, petitioner did appear in court and then voluntarily left. The only issue decided by the district court and the Tenth Circuit was that the misconduct of Williams' *counsel* resulted in jury passion and prejudice. Whether on remand the district court would cure the prejudice by ordering that plaintiff be barred from attending a second trial is merely a hypothetical question that is not yet ripe for adjudication and, in fact, will never be ripe because petitioner is now deceased.

ARGUMENT

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE TENTH CIRCUIT'S DECISION IS LIMITED TO THE FACTS OF THIS CASE AND IS IN COMPLETE ACCORDANCE WITH THE LAW OF THIS COURT AND OF EVERY CIRCUIT COURT

Though Williams desperately attempts to infuse this civil asbestos-related case with "constitutional" and "circuit splitting" issues, in fact, no such issues are presented. Rather, the Tenth Circuit's decision simply reflects a reaffirmation of well-settled legal principles; based on the specific facts presented herein, the Tenth Circuit found that the intentional misconduct of petitioner's counsel at trial resulted in a verdict tainted with passion and prejudice and thus required a new trial. While petitioner may not like the result of the Tenth Circuit's decision, it is not the task of this Court to sit as a "Supreme" court of appeals to review routine civil trial rulings.

A. The Tenth Circuit's Decision To Order A New Trial Based On The Prejudicial Misconduct Of Petitioner's Lawyer Neither Raises A Constitutional Question Nor Creates A Conflict Among The Circuits

Alleging that a civil plaintiff has an absolute right under the Fifth and Seventh Amendments to attend his trial, Williams contends that, by ordering a new trial in this case, the Tenth Circuit has somehow undermined that right.[5] Even assuming,

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5 Williams' reliance on the Seventh Amendment is frivolous. After receiving a $600,000 recovery in the district court by virtue of the remittitur, Williams argued to the Tenth Circuit that the jury's findings were no longer relevant in this case because final judgment "was not the judgment of the jury, but of the judge who heard the evidence and as such sat as a '7th juror.' " (10th Cir. Br. at 23). Now, after losing in the Tenth Circuit, the petitioner claims that his Seventh Amendment right to trial by jury—which he effectively waived by accepting remittitur—has somehow been violated.

arguendo, that the Tenth Circuit's decision can be construed, as petitioner suggests, as "effectively bar[ring]" Williams from attending his own trial (Pet. at 4), such decision would be, in any event, completely consistent with well-settled tenets of law.

No court has ever held that a civil plaintiff has an absolute right to attend his trial. Indeed, the Constitution does not even afford a *criminal defendant* the absolute right to attend his trial. *See, e.g., Faretta* v. *California*, 422 U.S. 806, 819-20 n.15 (1975); *Illinois* v. *Allen*, 397 U.S. 337, 342-43 (1970); *Snyder* v. *Massachusetts*, 291 U.S. 97, 105-06 (1934). In fact, the cases upon which Williams relies unequivocally hold that "[n]either the Fifth Amendment's due process clause nor the Seventh Amendment's guarantee of a jury trial grants to a civil litigant the *absolute* right to be present personally during the trial of his case." *Helminski* v. *Ayerst Lab.*, 766 F.2d 208, 213 (6th Cir.), *cert. denied*, 474 U.S. 981 (1985) (emphasis added). (*See* Pet. at 7-9 and cases cited therein).

In recognition that a civil litigant's due process rights are adequately protected where he is represented at trial by counsel,[6] there are many circumstances which justify excluding a civil plaintiff from trial. For example, in order to control the conduct in its courtroom, a court always retains the authority to remove a litigant where his behavior is deemed "disruptive." *See, e.g., Allen*, 397 U.S. at 343; *Marks* v. *Mobil Oil Corp.*, 562 F.Supp. 759, 768 (E.D. Pa. 1983), *aff'd*, 727 F.2d 1100 (3d Cir. 1984); Fed. R. Crim. P. 43(b)(2). Concerns about security may also justify barring a civil plaintiff's attendance at trial. *See, e.g., Price* v. *Johnston*, 334 U.S. 266, 285-86 (1948); *Poole* v. *Lambert*, 819 F.2d 1025, 1028 (11th Cir. 1987).

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6 *See Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919) ("We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person *or* by counsel . . .") (emphasis added).

Furthermore, where concerns of jury prejudice are raised by plaintiff's attendance, a court may be justified in barring plaintiff from the liability phase of trial. For instance, an attorney is never permitted to "parade a handicapped plaintiff before the jury in a deliberate attempt to elicit sympathy." *See, e.g., Gonzalez-Marin* v. *Equitable Life Assurance Society*, 845 F.2d 1140, 1147 (1st Cir. 1988) (quoting *Helminski*, 766 F.2d at 218 n.8). Moreover, where plaintiff cannot be of assistance to trial counsel or comprehend the proceedings, a court has the discretion to bar an incapacitated plaintiff from trial. *See, e.g., In re Richardson-Merrell, Inc. Bendectin Products Liability Litigation*, 624 F.Supp. 1212, 1224 (S.D. Ohio 1985), *aff'd*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989) (court excluded plaintiffs who were "deformed" and unable to "meaningfully consult with counsel"); *Morley* v. *Superior Court of Arizona*, 131 Ariz. 85, 638 P.2d 1331, 1334 (1981) ("A plaintiff unable to at least communicate with counsel will have no right denied by exclusion from the courtroom during the liability phase of the trial"); *Purvis* v. *Inter-County Telephone & Telegraph Co.*, 203 So.2d 508, 511 (Fla. App. 1967), *cert. denied*, 210 So. 2d 223 (Fla. 1968) ("showing [by defendant] that [plaintiff] was incompetent or so incapacitated that he could not comprehend the trial proceedings" justifies plaintiff's exclusion); *Gage* v. *Bozarth*, 505 N.E.2d 64, 68-69 (Ind. App. 1987) (court justified in excluding plaintiff who was "confined to a wheelchair," "dependent upon a ventilator in order to breathe" and was "unable to understand the proceedings"); *Dickson* v. *Bober*, 269 Minn. 334, 130 N.W.2d 526, 529-30 (1964) (court justified in excluding plaintiff where "[h]ideous and agonizing groans and sounds emanated from plaintiff" and plaintiff was "unable to comprehend trial proceedings"); *Monteleone* v. *Gestetner Corp.*, 140 Misc. 2d 841, 531 N.Y.S.2d 857, 861 (1988) (court justified in excluding deformed plaintiff who was unable "to comprehend the proceedings" or "in any meaningful way assist counsel"); *Bremner* v. *Charles*, 312 Or. 274, 821 P.2d 1080, 1085 (1991), *pet. for cert. filed*, 61 U.S.L.W. 3266 (Sept. 16, 1992) ("plaintiff

who is unable to comprehend, to meaningfully participate in the proceedings, or to assist his or her lawyer . . . may be excluded from the liability portion of the trial").

Although Williams did attend his trial, and then voluntarily chose to leave, the circumstances in this case would have, in any event, justified his removal from the courtroom under the above-described standards. The district court found—and the Tenth Circuit concurred—that: Williams' "moaning and groaning" was "distracting" to "all participants" at trial; Williams' physical state was "astound[ing]"; Williams "was [not] of a mental state of mind to be able to follow even what was being said or what was going on in the trial"; and Williams' attorney paraded his client before the jury, and then "ushered" him out after only thirty minutes.[7]

Reading Williams' petition, one would think that the Tenth Circuit ordered a new trial simply because Williams was in poor health; that is not, however, what occurred in this case. Petitioner completely fails to mention to this Court that the jury's passion and prejudice stemmed *not* just from Williams' appearance, but from his lawyer's trial strategy intentionally designed to mislead the jury to believe that Williams' *cancer-induced* appearance was caused by his alleged exposure to asbestos dust. Clearly, no constitutional right is at issue where, as here, a new trial is granted because an attorney engaged in trial misconduct intentionally aimed at prejudicing a jury. *See, e.g., Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Moquin*, 283 U.S. 520 (1931).

In sum, there would have been compelling justification for the district court in this case to order Williams' removal from the courtroom on the first day of trial. The district court, how-

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7 Petitioner now asserts that his attendance at trial was necessary to assist counsel. (Pet. at 7). That contention is belied by the facts as found by the district court. Indeed, though he was never ordered to leave the courtroom, Williams only stayed at trial long enough for the jury to get a good look at him.

ever, issued no such order, and plaintiff left voluntarily after thirty minutes. However, because counsel for Williams paraded the semi-comatose, terminally ill Williams in front of the jury, and then misrepresented the cause of Williams' illness, the district court and Tenth Circuit concluded that the jury's fact-finding ability was tainted by passion and prejudice. The Tenth Circuit's decision to order a new trial, therefore, raises no constitutional issues nor creates any conflict among the circuits.

B. The Tenth Circuit's Decision To Vacate The Grant Of Remittitur Neither Raises A Constitutional Issue Nor Creates A Conflict Among The Circuits

Williams also requests a writ of certiorari because he believes that the Tenth Circuit's decision to grant a new trial is in error. Though Williams concedes that a new trial, and not remittitur, is the required remedy where a jury verdict is tainted by passion and prejudice, he argues that a remittitur is justified here because only the jury's excessive award was tainted with passion and prejudice. (Pet. at 10). However, the Tenth Circuit disagreed with this argument and, exercising its appellate authority, held that the district court's finding—arbitrarily isolating the effects of the jury's prejudice to the damage award—was clearly erroneous in this case. (Pet. App. at 17a). It is not disputed that Williams' counsel "sowed the seeds" of passion and prejudice by misleading the jury during the *liability* phase of the trial; the Tenth Circuit thus concluded in this case that the jury's *entire verdict* was tainted requiring a new trial. (*Id.* at 18a). And, in light of the deliberate attempts by Williams' counsel to play to the passion and prejudice of the jury, the Tenth Circuit's decision to vacate the remittitur and order a new trial is hardly a novel ruling.

In fact, over 60 years ago, this Court endorsed such a result. In *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Moquin*, 283 U.S. 520 (1931), the jury found for plaintiff in a personal injury action. Defendant unsuccessfully urged the trial court to order a new trial on the ground that the "misconduct of [plain-

tiff's] counsel in making appeals to passion and prejudice had prevented an impartial trial." *Id.* Although on appeal the court found that, "[f]rom the entire record before us we are of the opinion that the verdict is excessive because of passion and prejudice," it only granted a remittitur. *Id.* at 521. This Court, however, vacated the remittitur and ordered a new trial. As the Court explained:

> [N]o verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously, such means [of counsel misconduct] may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation . . .

Id.; *accord City of Cleveland* v. *Peter Kiewit Sons' Co.*, 624 F.2d 749, 760 (6th Cir. 1980) (remittitur vacated and new trial granted where counsel engaged in prejudicial misconduct); *Edwards* v. *Sears, Roebuck & Co.*, 512 F.2d 276, 282-83 (5th Cir. 1975) (same); *see also Berger* v. *United States*, 295 U.S. 78, 89 (1935) (new trial required where prosecutor intentionally informed jury of prejudicial facts not in evidence).[8]

Consistent with *Minneapolis*, any time an appellate court—in the Tenth Circuit and every other circuit—has concluded that

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8 Petitioner makes much of the district court's use of the word "inference" in connection with its finding of jury passion and prejudice. (Pet. at 12). Williams seems to suggest that, absent a finding of "actual" jury passion and prejudice, a new trial may never be ordered. On a post-trial motion, however, there is no way to assess jury passion and prejudice other than by drawing inferences from the record. Indeed, in *Minneapolis*, where a claim of jury passion and prejudice was also asserted, this Court reviewed the record, and then determined that prejudicial conduct at trial may have tainted the jury as to its findings on liability and damages. That is what the district court and Tenth Circuit did here, and both courts concluded that trial counsel's misconduct impermissibly played to the passion and prejudice of the jury. However, as in *Minneapolis*, the Tenth Circuit held that the district court's attempt to isolate the prejudice to the jury award was clearly erroneous.

a jury verdict, and not just its excessive award, is likely the result of jury passion and prejudice, it has required a new trial. *See, e.g., Wells* v. *Dallas Independent School Dist.*, 793 F.2d 679, 683-84 (5th Cir. 1986); *Malandris* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983); *Ford Motor Co.* v. *Mahone*, 205 F.2d 267, 272 (4th Cir. 1953); *see generally* 6A Moore's Federal Practice, § 59.08[7] at 59-197-98 (1992). Petitioner suggests that the Tenth Circuit's decision in this case is a departure from this well-settled rule, and that its ruling will require a new trial every time there is an excessive damage award. (Pet. at 10). Such assertion is incorrect. The Tenth Circuit Panel here expressly stated that it was following its previous decisions (Pet. App. at 17a), which unequivocally hold that, where "there was error only in an excessive damage award, but not one also tainting the finding of liability, the appellate court may order a remittitur . . . a widely recognized remedy." *Malandris*, 703 F.2d at 1168. Applying this standard, however, necessarily requires a case by case analysis based on the unique facts presented.

In sum, it is bedrock law that a jury verdict based on passion and prejudice cannot be remedied by remittitur, but rather, mandates a new trial. Based on the record in this case, both the district court and the Tenth Circuit determined that the intentional misconduct of Williams' lawyer led the jury to be influenced by passion and prejudice. Moreover, the Tenth Circuit concluded that the prejudice here inevitably affected the entire verdict and thus, a new trial was mandated. As the Tenth Circuit's decision comports with universally-accepted legal principles, and is limited to the facts herein, review by the Supreme Court is not warranted.

II.

THE ALLEGED CONSTITUTIONAL QUESTION RAISED BY PETITIONER IS NOT RIPE FOR ADJUDICATION

Pursuant to Article III, section 2, of the Constitution, federal courts are not permitted to pass on constitutional issues that are not yet "ripe"—*i.e.*, the questions are merely premised on a hypothetical or speculative set of facts. *See, e.g., United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89-90 (1947). In his petition, Williams presents to the Court the following "constitutional" question for review:

> 1. Whether or not it is a violation of the Fifth and Seventh Amendments to the United States Constitution to prohibit a civil plaintiff because of physical impairment from attending and assisting in his trial.

The only time that Williams even attempts to articulate precisely how this right was violated here is on page seven of his petition:

> Under the terms of the panel's Order, the only way that Mr. Williams *could* have avoided prejudicing the jury *would* have been by not attending his own trial.

(Pet. at 7) (emphasis added). Plainly, such rank speculation does not satisfy the "case or controversy" requirement of Article III.

Williams did attend his trial. After remaining only thirty minutes, Williams voluntarily left his trial. The district court never ordered that Williams could not attend his trial. The Tenth Circuit never ordered that Williams should not have been allowed to attend his first trial. The Tenth Circuit never ordered that Williams should be barred from attending his next trial. Indeed, this issue was never even raised by defendants, by plaintiff or by the district court, and was not briefed to the Tenth Circuit Panel. In short, Eagle-Picher argued, and the district court and Tenth Circuit concurred, that the misconduct of

Williams' lawyer—parading Williams into and out of the courtroom on his deathbed and then misleading the jury as to the cause of his illness—resulted in jury prejudice.

While it is true that, on remand, the district court will have to fashion appropriate safeguards to ensure that such prejudicial tactics do not infect a second trial, no one now knows what the district court will ultimately order. One fact that is certain, however, is that Williams' attendance at trial will *never* become an issue in this case because he is now deceased. The "constitutional" question Williams asks this Court to adjudicate is not ripe now and, in fact, will never be ripe. Thus, Article III prevents this Court from passing on such a hypothetical question.

CONCLUSION

The decision of the Tenth Circuit raises no constitutional issues nor creates any conflict among the circuits. Rather, the decision merely applies well-settled principles of law to the specific facts of this case: because petitioner's counsel engaged in trial misconduct intended to evoke the passion and prejudice of the jury, a new trial has been ordered. Finally, as petitioner has never been barred from attending his trial—and never will be so ordered because he is now deceased—the "constitutional" question presented by petitioner is not ripe for adjudication. For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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